

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRUCE GORDON	:	DETERMINATION
	:	DTA NO. 820211
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2003.	:	

Petitioner, Bruce Gordon, 9 Red Maple Lane, Dix Hills, New York 11746, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2003.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed February 7, 2005, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5; 3000.9(a)(i) and (b) on the ground that there exists no material and triable issue of fact. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with the exhibits attached thereto in support of the motion. Petitioner had 30 days, or until March 9, 2005, to respond to the motion but did not do so, and the 90-day period for issuance of this determination commenced on March 9, 2005. After due consideration of the documents and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Bruce Gordon, a Notice of Deficiency, dated April 26, 2004, and addressed to him at “9 Red Maple Ln, Dix Hills, NY 11746-7722.” The notice bore assessment identification number L-023707424-3 and asserted a total amount due of \$31,203.67. As indicated by the computation summary section of the notice, this amount consisted of withholding tax (penalty) assessed of \$31,771.07, and a credit of \$567.40, for the period ended March 31, 2003.

2. On September 1, 2004, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the Notice of Deficiency dated April 26, 2004. This request was in the form of a letter addressed to the Compliance Division of the New York State Department of Taxation and Finance, 400 Oak Street, Garden City, New York.

3. On October 8, 2004, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on April 26, 2004, but the request was not mailed until September 2, 2004, or in excess of 90 days, the request is late filed.

4. Notices of deficiency, such as the one at issue herein, were computer-generated by the Division’s computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a certified mail record

(“CMR”). The CMR listed those taxpayers to whom notices of deficiency were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

5. Each computer-generated notice of deficiency was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading “Certified No.” The CMR listed an initial date (the date of its printing) in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date of April 14, 2004 (expressed as the 105th day of 2004), which was manually changed to April 26, 2004.

6. After a notice of deficiency was placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer placed the notice and associated documents into a windowed envelope, weighed and sealed the envelope and affixed the appropriate postage and fee amounts thereon. A Mail Processing Center clerk then checked the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the sealed, stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this

instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark or his signature or initials, or both, to the CMR.

7. In the ordinary course of business a Mail Processing Center employee picked up the CMR from the post office on the following day and returned it to the CARTS Control Unit.

8. In the instant case, the CMR was a 39-page, fan-folded (connected) computer-generated document entitled "Certified Record for Presort Mail-Assessments Receivable." All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR listed 427 control numbers. Each such certified control number was assigned to an item of mail listed on the 39 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

9. Information regarding the Notice of Deficiency issued to petitioner was contained on page 25 of the CMR. Corresponding to certified control number 7104 1002 9730 0025 6953 was notice number L 023707424, along with petitioner's name and an address, which was identical to that listed on the subject Notice of Deficiency.

10. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated April 26, 2004, and the initials of the postal employee, verifying receipt of the items.

11. The last page of the CMR, page 39, contained a preprinted entry of "427" corresponding to the heading "Total Pieces and Amounts." Beneath this preprinted entry the postal employee wrote and circled the total number of pieces of certified mail received.

12. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the writing and circling of the “427” indicated that all 427 pieces listed on the CMR were received at the post office.

13. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

14. The facts set forth above in Findings of Fact “4” through “13” were established through the affidavits of Geraldine Mahon and Bruce Peltier. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of deficiency. Mr. Peltier was employed as a Mail and Supply Supervisor in the Registry Unit of the New York State Department of Taxation and Finance. Mr. Peltier’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

15. The address on the subject Notice of Deficiency was the same as the address given on petitioner’s New York State personal income tax return for the year 2003, electronically filed on or before April 15, 2004, and the most recent return filed when the Notice of Deficiency was issued. In addition, the same address was used by petitioner on his request for conciliation conference, dated August 30, 2004, and on his petition herein, dated September 19, 2004.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where it has been determined that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state." In this case, the record is clear that the address listed on the subject Notice of Deficiency was petitioner's last known address.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with BCMS, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. (*See, Matter of Novar TV*

& Air Conditioner Sales and Service, Inc., Tax Appeals Tribunal, May 23, 1991 [where the Tax Appeals Tribunal stated that “where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination”].) Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency.

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Deficiency in issue was mailed to petitioner on April 26, 2004. Specifically, this 39-page document listed certified control numbers with corresponding names and addresses, including petitioner’s control number, notice of deficiency (assessment) number, name and address. All 39 pages of the CMR bore a U.S. Postal Service postmark dated April 26, 2004. Additionally, as part of the standard procedure for the issuance of notices of deficiency, a postal employee signed (initialed) page 39 of the CMR and wrote and circled “427” on that page to indicate receipt by the post office of all 427 pieces of mail listed thereon (*cf., Matter of Roland*, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be

inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the writing and circling of the number of total pieces of mail listed)). This evidence is sufficient to establish that the Division mailed the subject Notice of Deficiency on April 26, 2004.

H. Petitioner's request for conciliation conference was filed on September 1, 2004, in excess of 90 days after the issuance of the Notice of Deficiency on April 26, 2004. Therefore, the request was untimely filed (*see*, Tax Law § 681[b]; § 689[b]; § 170[3-a][a]; 20 NYCRR 3000.3[c]).

I. The Division's Motion for Summary Determination is granted and the petition of Bruce Gordon is dismissed.

DATED: Troy, New York
March 31, 2005

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE